



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ACCC Decision

WaterNSW will cease to be a Part 6
operator under the Water Charge
Rules 2010

13 April 2022

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1. Decision

The ACCC has formed the view that WaterNSW will cease to be a Part 6 operator under rule 23 of the *Water Charge Rules 2010* (WCR) after 30 June 2025. This is because the ACCC considers that WaterNSW will be required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with subrule 29(2)(b) of the WCR after the end of WaterNSW's current regulatory period.

This means that after 30 June 2025, New South Wales Independent Pricing and Regulatory Tribunal (IPART) will set WaterNSW's infrastructure charges under NSW State law and regulatory framework¹ and will not need an exemption under the WCR to do so.²

2. Introduction

WaterNSW is a State-owned Corporation established under the *Water NSW Act 2014* and currently operates under the *WaterNSW Operating Licence 2017-22*.³ WaterNSW is Australia's biggest water supplier. It operates 42 dams across NSW, as well as hundreds of weirs, regulators and pipelines. It supplies and delivers water through its infrastructure and the State's river systems to its customers which include Sydney Water, farmers, irrigators, regional towns and industry.⁴

WaterNSW is considered to be an infrastructure operator under the *Water Act 2007* (Cth) (Water Act) because it owns and operates infrastructure for the purposes of providing services (water harvesting, storage, delivery and drainage) to customers who do not own or operate the infrastructure.⁵

Under the *Water Charge (Infrastructure) Rules 2010* (WCIR), WaterNSW was a Part 6 operator.⁶ The following section describes the recent changes to the definition of a Part 6 operator in the WCR, that have led to WaterNSW's status as a Part 6 operator being considered in this decision.

¹ Previously, IPART approved or determined Basin infrastructure charges under State law that applied the Commonwealth framework in the *Water Charge Infrastructure Rules 2010* (WCIR). See section 3 for more on previous arrangements and changes to the WCR.

² Obligations in other parts of the [Water Charge Rules 2010](#) (WCR) will continue to apply to WaterNSW.

³ Under section 11 of the *WaterNSW Act 2014* (NSW), the operating licence is granted by the Governor on the recommendation of the portfolio Minister. The licence enables WaterNSW to exercise its functions.

⁴ Water NSW, <https://www.waternsw.com.au/about/who-we-are>, accessed on 6 April 2022.

⁵ An infrastructure operator is a person that owns or operates infrastructure for one or more of the following purposes: (a) the storage of water, (b) the delivery of water, (c) the drainage of water, for the purpose of providing a service to someone who does not own or operate the infrastructure. See: *Water Act 2007*, section 7(1). WaterNSW operates NSW's rivers, dams and water supply systems. It supplies water from its storages to (urban and non-urban) customers in the NSW's regulated surface water systems, including in Fish River Water Supply Scheme and nine valleys in the Basin.

⁶ Under section 91(3) of the *Water Act 2007*, the WCR do not relate to charges in respect of urban water supply activities beyond the point at which the water has been removed from a Basin water resource.

3. The legal framework and arrangements for regulating Part 6 Operators have changed

3.1. WaterNSW's charges were regulated under arrangements accredited under the WCIR

The WCIR set requirements relating to regulated charges payable to infrastructure operators for infrastructure services in the Murray-Darling Basin (Basin).⁷ Part 6 of the WCIR provided a framework for the determination or approval of regulated charges of Part 6 operators. The regulator was the ACCC by default, unless an eligible state regulator applied for, and was granted, accreditation under Part 9 of the WCIR.⁸

WaterNSW was classified as a Part 6 operator under the WCIR, as a non-member owned infrastructure operator that provided services in relation to more than 250GL of 'managed water resources'.⁹

The ACCC determined charges under the WCIR framework for WaterNSW (then known as State Water) in June 2013.

In September 2015, pursuant to Part 9 of the WCIR, the ACCC accredited arrangements that allowed IPART to determine and approve the infrastructure charges of Part 6 operators in NSW.¹⁰ The NSW Government gave effect to the arrangements by introducing Part 3B of the *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act).

On 9 September 2021, IPART determined WaterNSW's charges for the current regulatory period for catchments within the Basin pursuant to rule 29 of the WCIR (set out in Schedules 1, 2, 4 and 5) and for non-Basin catchments under the IPART Act (in Schedules 2, 3 and 4).

⁷ The WCIR and the accreditation arrangements refer to 'regulated charges' rather than 'infrastructure charges'. However, the definition of 'regulated charges' under the previous WCIR is the same as the definition of 'infrastructure charges' under the new WCR. That is, a charge of a kind referred to in section 91(1)(a), (b) or (d) of the Act other than: (a) a fee to which rule 13 of the *Water Market Rules 2009* applies [a transformation application fee]; or (b) a termination fee.

⁸ ACCC, [ACCC Water Charge Rules Final Advice](#), September 2016, p 141. Available at: [Review of the water charge rules: advice development - Final advice](#). Accessed on 5 April 2022.

⁹ Sub-rule 23(1) of the WCIR stated that Part 6 of those Rules applied to an infrastructure operator that is not a member owned operator if the sum of the maximum volume of water from managed water resources in respect of which the operator provides infrastructure services in relation to: (a) water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water); and (b) water access entitlements held by its customers; and (c) water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator: is more than 250 GL.

¹⁰ ACCC, [ACCC Final Decision on IPART application for accreditation](#), 23 September 2015. Available at <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/ipart-application-for-accreditation-under-the-water-charge-infrastructure-rules/final-decision>. Accessed on 6 April 2022.

3.2. Rule amendments changed Part 6 test and obligations

The *Water Charge Amendment Rules 2019* (the amending rules) amended and combined the WCIR, the *Water Charge (Termination Fees) Rules 2009* and the *Water Charge (Planning and Management Information) Rules 2010* into a single set of rules—the WCR.¹¹

Relevantly, an intent of the WCR is to hand back regulatory responsibility for Part 6 infrastructure operators to Basin states under Basin state laws, where Basin state regulatory approaches ensure that relevant infrastructure operators' costs are prudent and efficient and infrastructure charges are set at levels that would not allow the operator to earn monopoly returns.¹² The test to determine whether an infrastructure operator is a Part 6 operator changed under the WCR.

3.3. A new test determines Part 6 classification under the WCR

Rule 23 of the WCR provides that:

*An infrastructure operator is a **Part 6 operator** if:*

- (a) the operator is not required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with paragraph 29(2)(b); and*
- (b) the operator levies an infrastructure charge in relation to either:
 - (i) a bulk water service¹³ in respect of water access rights; or*
 - (ii) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State.**

Note: Subparagraph (b)(i) would not normally apply to an off-river infrastructure operator.

Rule 29(2)(b) provides that:

that the forecast revenue from the charges is reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services, less:

- (i) any government contributions related to the provision of those infrastructure services; and*
- (ii) any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and*
- (iii) any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.*

If an infrastructure operator is a Part 6 operator under the WCR, then its infrastructure charges will be determined or approved by the ACCC under divisions 2, 3 and 4 of Part 6 of the WCR (unless the ACCC grants the operator an exemption from the operation of the requirements in divisions 2, 3 and 4 of Part 6).

¹¹ Federal Register of Legislation, [Water Charge Amendment Rules 2019](#), accessed on 8 February 2022.

¹² Federal Register of Legislation, [Replacement Explanatory Statement, Water Charge Amendment Rules 2019](#), item 2, accessed on 8 February 2022.

¹³ A bulk water service is a service for the storage and/or delivery of water that is primarily on-river. Federal Register of Legislation, [Water Regulations 2008](#), regulation 1.03, accessed on 29 March 2022.

If the infrastructure operator is not a Part 6 operator under the WCR (or the ACCC has granted the operator an exemption from its Part 6 obligations) then the operator's infrastructure charges are set under State law.

3.4. Transitional provisions apply to existing Part 6 operators

Rule 81 of the WCR sets out transitional provisions dealing with infrastructure operators that were Part 6 operators immediately before 1 July 2020.

On 30 June 2020, WaterNSW submitted a pricing proposal for its regulated charges to IPART in accordance with rule 25 of the WCIR. The pricing proposal is considered a transitional application under subrule 81(3) of the WCR because it was submitted before the WCR commenced on 1 July 2020. Under subrule 81(3), this means that the transition period for WaterNSW ends at the end of the regulatory period for IPART's determination or approval of that transitional application.¹⁴ IPART's determination for the 2021-2025 regulatory period commenced on 1 October 2021 and ends on 30 June 2025.¹⁵ WaterNSW's transition period under the WCR will therefore end on 30 June 2025.

3.5. WaterNSW has notified the ACCC of its view that it will cease to be a Part 6 Operator

On 16 August 2021, pursuant to 81(11) of the WCR¹⁶, WaterNSW notified the ACCC of its view that it will cease to be a Part 6 operator after the end of its transition period (30 June 2025) (**Attachment A**). The notice states that WaterNSW considers that it 'no longer satisfies the requirement set out in rule 23(a)' because the 'IPART Act regulates infrastructure charges in a way that is consistent with rule 29(2)(b) of the [WCR]'.¹⁷ The notice also states that the Standing Reference, discussed in the next section, 'further ensures that the policy objectives underlying rule 29(2)(b) of the Water Charge Rules

¹⁴ WaterNSW initially applied to IPART for a one-year regulatory period (2021-2022). On 11 November 2020, IPART advised WaterNSW that it had carefully considered the proposal but, on weighing all circumstances and stakeholder submissions, had decided on balance that a determination period of four years was likely to deliver the best outcome for stakeholders. See: <https://www.ipart.nsw.gov.au/sites/default/files/documents/letter-determination-period-for-our-2021-determination-of-water-nsws-rural-bulk-water-prices-11-november-2020.pdf>. Accessed on 8 February 2022.

¹⁵ On 28 May 2021, IPART advised WaterNSW that it had decided to defer its determination of the maximum charges that WaterNSW could charge for its rural bulk water services for the 2021-2025 regulatory period until mid-September 2021. See: IPART Letter to WaterNSW regarding deferred release of 2021 WaterNSW and WAMC Determinations - https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Letter-to-Water-NSW-Deferred-release-of-2021-Water-NSW-and-WAMC-Determinations-26-May-2021.PDF. Accessed on 23 December 2021.

As a result, WaterNSW's charges for the 2020-21 regulatory period would remain in place until 30 September 2021. See: <https://www.ipart.nsw.gov.au/Home/Industries/Water/Reviews/Rural-Water/WaterNSW-rural-bulk-water-prices-from-1-October-2021> and <https://www.waternsw.com.au/customer-service/ordering-trading-and-pricing/pricing/2021-22-water-pricing>. Accessed on 8 February 2022.

¹⁶ Subrule 81(11) of the WCR states: As soon as practicable after 1 July 2020, the infrastructure operator must notify the ACCC of: (a) whether or not it is a Part 6 operator under rule 23 as amended by the amending rules; and (b) any matter that it is aware of that may result in the infrastructure operator ceasing to be a Part 6 operator, or becoming one, on a specified date.

¹⁷ Attachment A, *WaterNSW notification under rule 81(11) of the Water Charge Rules 2010 – 9 August 2021*, p 3.

are given due consideration by specifically requiring IPART to consider ‘the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [WCR]’.¹⁸ t.

Rule 81(12) provides that the ACCC must:

(a) form a view as to whether the infrastructure operator is a Part 6 operator under rule 23 as amended by the amending rules, or is likely to cease to be one or to become one before the end of the transition period; and

(b) notify the operator of the ACCC’s view; and

(c) if the ACCC is of the view that the operator is, or is likely to be, a Part 6 operator—advise the operator that the ACCC will decide whether the operator should be granted an exemption from the operation of Divisions 2, 3 and 4 of Part 6 after the end of the transition period.

3.6. Arrangements governing IPART’s setting of Infrastructure Charges have changed

On 29 May 2020, the NSW Minister exercised his powers under section 12(1) of the IPART Act to refer the determination of pricing for Basin services to IPART.

The NSW Minister issued a standing Ministerial reference (the Ministerial reference, **Attachment B**)¹⁹ under which the Minister:

- exercised his powers under section 12(1) of the IPART Act to refer the determination of pricing for Murray-Darling Basin Services (MDBS) to IPART, which is defined to include ‘all infrastructure services provided by WaterNSW as a Part 6 Operator’
- directed IPART under section 13(1)(c) of the IPART Act, ‘whenever it conducts an investigation pursuant to that reference, to consider the approach to approving infrastructure charges provided for under rule 29(2)(b) of the WCR’.

WaterNSW has submitted that it will cease to be a Part 6 operator after the end of the transition period because:

- WaterNSW considers that the IPART Act, including section 15 of the IPART Act which specifies the matters that IPART is to have regard to when determining or approving charges, is consistent with rule 29(2)(b) of the WCR. In their notification, WaterNSW states:

Water NSW considers that s. 15 of the IPART Act ensures the principle that infrastructure charges are determined or approved in a way consistent with rule 29(2)(b) of the WCR is given due consideration by IPART. WaterNSW considers that the Standing Reference further ensures that the policy objectives underlying rule 29(2)(b) of the Water Charge Rules are given due consideration by specifically requiring IPART to consider ‘the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [Water Charge Rules]’.

¹⁸ Attachment A, *WaterNSW notification under rule 81(11) of the Water Charge Rules 2010 – 9 August 2021*, p 5.

¹⁹ Attachment B, *IPART ministerial standing reference and direction – 29 May 2020*.

4. Consultation

The ACCC conducted a 2-week public consultation, publishing WaterNSW's notification and IPART's submissions on its website, seeking submissions on whether WaterNSW will cease to be a Part 6 operator within the meaning of the WCR via the ACCC consultation hub from Wednesday 23 February 2022 to Wednesday 9 March 2022. The ACCC did not receive any submissions in response to this consultation.

5. Reasons for ACCC decision – ceasing to be a Part 6 operator

There are two key requirements that must be met for an infrastructure operator to be a Part 6 operator under the WCR (see section 3.3). In relation to the first requirement, the ACCC has formed the view that WaterNSW will no longer satisfy subrule 23(a) (after the end of its regulatory period). That is, after 30 June 2025 WaterNSW will be required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with the obligations in subrule 29(2)(b) of the WCR and so will cease to be a Part 6 operator.

Given this, it is unnecessary to consider whether WaterNSW satisfied the second limb, subrule 23(b) (that is, whether WaterNSW levies an infrastructure charge in relation to a bulk water service in respect of water access rights.)

The reasons for the ACCC decision are set out below, considering the elements of subrule 23(a)—first, whether WaterNSW is required to have all its infrastructure charges determined or approved by a single State Agency under a law of a State and second, whether the determination or approval is in a way that is consistent with the obligations in subrule 29(2)(b) of the WCR.

5.1. All WaterNSW's infrastructure charges will be determined or approved by a single State Agency under a law of the state

The ACCC considers that IPART is a 'single state agency' within the meaning of rule 23 of the WCR.²⁰ Under the IPART Act, IPART has a standing reference to determine the maximum prices that WaterNSW can charge for water services (which include the infrastructure charges it levies within the Basin).²¹

The NSW legislation governing the arrangements for setting WaterNSW's charges comprises:

- the *Water NSW Act 2014* (WaterNSW Act), which establishes WaterNSW as a State-owned Corporation and sets out its principal objectives, functions, areas of operation and authorises it to impose fees²²

²⁰ Rule 3 of the WCR provides that 'State Agency' means an agency of a State within the meaning of paragraph (c) of the definition of agency of a State in the Act. Section 4(1)(c) of the Water Act relevantly provides that 'agency of a State' means a body (whether incorporated or not) established or appointed for a public purpose by or under a law of the Commonwealth.

²¹ NSW Legislation, [Independent Pricing and Regulatory Tribunal Act 1992](#), Schedule 1. Accessed on 8 February 2022.

²² NSW Legislation, [Water NSW Act 2014](#), section 39 provides that WaterNSW may impose fees and charges on any person to whom WaterNSW provides a service in the exercise of its functions. Accessed on 8 February 2022.

- the IPART Act, which establishes IPART, sets out its primary functions, and governs how it carries out those functions.²³ Under the IPART Act, IPART is responsible for regulating prices and reviewing the pricing policies of government monopoly services. The IPART Act specifies that WaterNSW is a supplier of such services.²⁴

The IPART Act and the WaterNSW Act are ‘laws of the state’ made by the NSW state parliament.²⁵ The ACCC considers that ‘a law of a State’ can also include legislative instruments. The ACCC also considers that the Ministerial reference, discussed in section 3.6, is a legislative instrument because it determines the content of certain sections of the IPART Act.²⁶ As such, the ACCC considers the Ministerial reference is a law of a state. The effect of the Ministerial reference is discussed further under section 5.2.1.

Subrule 3(1) of the WCR provides that an ‘infrastructure charge means a charge of a kind referred to in paragraph 91(1)(a), (b) or (d)’ of the Water Act. Those charges are:

- fees or charges payable to an ‘irrigation infrastructure operator’, broadly in relation to access to the operator’s irrigation network, or services in relation to that access
- ‘bulk water charges’, which broadly are charges payable for either or both the storage of water for, or the delivery of water to other infrastructure operators, other operators of reticulated water systems and other prescribed persons
- fees or charges prescribed by regulation 4.01A of the *Water Regulations 2008* (Cth) for the purposes of section 91(1)(d) of the Water Act, which, in summary, relate to access to an operator’s water service infrastructure, or services in relation to that access.

The ACCC considers that any WaterNSW charges that would constitute infrastructure charges for the purposes of the WCR would be regulated by IPART. These include bulk water charges, Murray–Darling Basin Authority (MDBA) and Dumaresq–Barwon Border Rivers Commission (BRC) charges and metering charges.²⁷

- WaterNSW’s bulk water charges are levied on infrastructure operators and other operators of reticulated water systems for the storage and delivery of water.
- The MDBA and Dumaresq–Barwon BRC charges recover some of the funding NSW contributes to these cross-jurisdictional bodies to cover the costs of bulk water storage and river operations.²⁸

²³ IPART, [Independent Pricing and Regulatory Tribunal Act 1992.](#), accessed on 30 March 2022.

²⁴ IPART, [Independent Pricing and Regulatory Tribunal Act 1992.](#), section 4(7), accessed on 30 March 2022.

²⁵ Section 4(1) of the Water Act defines ‘law of a State’ as ‘a law of, or in force in, a State but does not include a law of the Commonwealth in force in the State.’

²⁶ Namely the Ministerial reference determines the content of section 12(1) of the IPART Act by specifying that IPART’s functions include determining the pricing for ‘Murray-Darlin Basin Services’; and it determines the content of section 15 of the IPART Act by adding a further matter that IPART must take into account when determining prices.

²⁷ IPART, [Final Report - Review of Water NSW’s rural bulk water prices](#), September 2021. Available at https://www.ipart.nsw.gov.au/documents/final-report/final-report-review-water-nsws-rural-bulk-water-prices-september-2021?timeline_id=6913. Accessed 18 January 2022.

²⁸ Atkins, [Review of MDBA and BRC costs associated with Water NSW and MAMC’s activities](#), 3 March 2021, p 93. Accessed on 30 March 2022.

The ACCC considers that WaterNSW's bulk water charges and the MDBA and BRC charges meet the definition of infrastructure charges. The ACCC considers that at least some of the metering charges determined by IPART will be infrastructure charges.²⁹

The ACCC considers that WaterNSW is required to have all its infrastructure charges determined or approved by a single State Agency under a law of the state.

5.2. These infrastructure charges are determined or approved in a way that is consistent with paragraph 29(2)(b) of WCR

As discussed above, the ACCC is satisfied that all of WaterNSW's infrastructure charges will be approved by a single State Agency under a law of a State at the end of WaterNSW's regulatory period. The second part of subrule 23(a) is whether WaterNSW's infrastructure charges are determined or approved in a way that is consistent with subrule 29(2)(b) of the WCR.

In its 2016 *Review of the Water Charge Rules: Final Advice*, the ACCC considered that subrule 23(a) would set a 'basic standard for regulatory oversight'.³⁰ The ACCC also stated that while the approaches used by Basin state regulators such as IPART are not identical to the WCR, they are likely to be consistent with subrule 29(2)(b).

Rule 23 provides that the relevant charges must be regulated 'in a way that is consistent' with the obligations set out under subrule 29(2)(b). The ACCC considers that the measure of 'in a way' as well as the requirement for 'consistency' allow for some flexibility and do not require that the relevant State laws reproduce the WCR requirements exactly.

Subrule 29(2)(b) requires that forecast revenue is 'reasonably likely to meet' but not materially exceed, the prudent and efficient costs of providing the infrastructure services (less the amounts referenced in the rule).³¹

The ACCC considers that the phrase 'reasonably likely to meet' means that the ACCC needs to be satisfied that there is a real chance (that is, one that is not fanciful or remote) that the forecast revenue from charges will meet, and not materially exceed, the prudent and efficient costs of providing the infrastructure services.

The terms 'prudent' and 'efficient' are not defined in the Water Act, the WCIR or the WCR. Based on its experience in regulation in the water sector under the WCIR and the WCR frameworks, and in other regulated sectors under other regulatory frameworks, the ACCC considers that costs will be 'prudent and efficient' if the costs are the same as would be incurred by a commercial operator, competing in a competitive market, providing the desired quantity and quality of services, complying with all relevant regulatory and legislative obligations, based on the information available at the time, and including a normal market return on investment.

²⁹ Some metering charges relate to the costs of implementing the NSW Government's metering reform and may therefore be water planning and management charges. These charges are regulated by IPART in any case.

³⁰ ACCC, [Review of the Water Charge Rules Final Advice](#), September 2016, p 150, accessed on 6 April 2022.

³¹ Subrule 29(2)(b) requires that: the forecast revenue from the charges is reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services, less: (i) any government contributions related to the provision of those infrastructure services; and (ii) any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and (iii) any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.

In considering the NSW State laws and comparing them to the requirements set out under subrule 29(2)(b), the ACCC notes that there are a number of matters IPART 'must have regard to'. The ACCC notes that IPART, as the decision-maker, must take these matters into account, but that the weight given to a particular matter is for IPART to determine. As such, the ACCC has taken the view that the significance of any potential inconsistency between the requirements of subrule 29(2)(b) and the relevant State laws depends on whether IPART would apply those considerations in a way that is inconsistent with subrule 29(2)(b) of the WCR. That is, in the absence of a direct inconsistency, the existence of some matters that could possibly be applied in a way that is not consistent with subrule 29(2)(b) does not necessarily mean that regulation by IPART fails the standard for oversight in the WCR, provided that the State laws – as a whole – can be applied in a way that would meet the WCR standard.

Further, the ACCC acknowledges that a State regulatory framework could meet the standard required by the WCR in more than one way. The test in the WCR sets a threshold: it does not prescribe a methodology. Because IPART is required to have regard to certain matters, and to determine the appropriate balance between them, IPART could determine a range of outcomes under State laws that satisfy the test in the WCR.

Section 5.2.1 sets out the ACCC's assessment of the relevant State laws under which the IPART will determine or approve WaterNSW's infrastructure charges. On this basis the ACCC is satisfied that WaterNSW is required to have its charges determined or approved in a way that is consistent with subrule 29(2)(b) of the WCR.

Section 6 outlines some of the possible changes to IPART's approach currently being considered and section 7 notes IPART's approach as considered against the National Water Initiative (NWI) commitments.

5.2.1. The IPART regulatory framework is consistent with the WCR requirements

Objectives and matters to which IPART must have regard under State law

Section 15 of the IPART Act specifies the matters that IPART is to have regard to when determining or approving charges. The ACCC considers that these matters require IPART to determine or approve prices in a way that is consistent with the 'prudence and efficiency' requirements under subrule 29(2)(b) of the WCR.

Subsection (a) and (e) require IPART to have regard to 'the cost of providing the services concerned' and 'the need for greater efficiency in the supply of services so as to reduce costs for the benefit of consumers and taxpayers' respectively.

Subsection (c) requires IPART to have regard to the 'appropriate rate of return on public sector assets, including appropriate payment of dividends to the Government for the benefit of the people of New South Wales'.

Subsection (b) requires IPART to have regard to the 'protection of consumers from abuses of monopoly power in terms of prices, pricing policies and standard of services' and section (d), requires IPART to consider 'the effect on general price inflation over the medium term'.

Subsection (g) requires IPART to have regard to 'the impact on pricing policies of borrowing, capital and dividend requirements of the government agency concerned and, in particular, the impact of any need to renew or increase relevant assets' and

subsection (j) requires IPART to have regard to ‘considerations of demand management (including levels of demand) and least cost planning’.

As explained in the following section, the ACCC, in its comparative assessment, considers that subsections 15(1)(a), (b), (c) (d), (e), (g) and (j) above are consistent with the prudence and efficiency requirements under subrule 29(2)(b).

The ACCC sought further information about the effect of the matters under sections 15(1)(h), (i), (f), (k), and (l) of the IPART Act as these matters do not explicitly go to the considerations set out in subrule 29(2)(b) of the WCR. This further information highlights that IPART will consider the factors described in these subsections in a way that is consistent with subrule 29(2)(b) of the WCR when it is determining or approving infrastructure charges.

Subsection (h) requires IPART to have regard to ‘the impact on pricing policies of any arrangements that the government agency concerned has entered into for the exercise of its functions by some other person or body’. In its September 2021 *Review of WaterNSW’s rural bulk water prices*, IPART notes with respect to this matter, it determined ‘the prudent and efficient cost of construction and operational contracts’ that WaterNSW had entered into, and the ‘costs associated with these over the next period’.³²

Subsection (i) requires IPART to have regard to ‘the need to promote competition in the supply of the services concerned’. In its September 2021 *Review of WaterNSW’s rural bulk water prices*, IPART notes that ‘in determining efficient costs’ it was ‘mindful of relevant principles such as competitive neutrality’ and, as an example, ‘included a tax allowance for WaterNSW’.³³

Subsection (f) requires IPART to have regard to the need to maintain ecologically sustainable development (within the meaning of section 6 of the Protection of the Environment Administration Act 1991 (NSW)) by appropriate pricing policies that take account of all the feasible options available to protect the environment’. Section (k) requires IPART to consider ‘the social impact of the determinations and recommendations’.

Regarding sections (f) and (k) IPART notes in its December correspondence to the ACCC (**Attachment E**) that IPART considers it ‘necessary to seek a full picture of a regulated business in order to understand its costs and determine its prices’. IPART notes that ‘This includes the costs of meeting environmental obligations and maintaining its social licence to operate. Prices which did not allow WaterNSW to do so would not be efficient, because they would force WaterNSW to incur overall greater costs in the long-term’.³⁴

The remaining matter, subsection (l), requires IPART to have regard to ‘standards of quality, reliability and safety of the services concerned (whether those standards are specified by legislation, agreement or otherwise)’. In its September 2021 *Review of*

³² IPART, [Review of Water NSW’s rural bulk water prices from 1 October 2021 to 30 June 2025 Final Report](#), September 2021, p 218. Accessed on 8 February 2022.

³³ IPART, [Review of Water NSW’s rural bulk water prices from 1 October 2021 to 30 June 2025 Final Report](#), September 2021, p 218. Accessed on 8 February 2022.

³⁴ Attachment E - IPART response to ACCC letter - 21 December 2021.

WaterNSW's rural bulk water prices, IPART notes that it considered 'WaterNSW's efficient historical and forecast expenditure so it can meet the required standards'.³⁵

The ACCC has assessed State laws as consistent with the requirements of rule 29(2)(b)

As mentioned above, the ACCC considers that costs will be 'prudent and efficient' if the costs are the same as would be incurred by a commercial operator:

- competing in a competitive market,
- providing the desired quantity and quality of services,
- complying with all relevant regulatory and legislative obligations,
- based on the information available at the time, and
- including a normal market return on investment.

The ACCC considers that IPART's framework under State law will require IPART to assess the prudence and efficiency of WaterNSW's costs consistently with rule 29(2)(b) on the basis of the following considerations.

Under State law, IPART must have regard to 'the cost of providing the services concerned'³⁶ which is consistent with taking into account the prudent and efficient costs that would be incurred by WaterNSW. Also, as factors that would influence these costs, subsection (d) requires IPART to consider 'the effect on general price inflation over the medium term' and 'standard of services' under subsection (b). The ACCC considers that these matters are consistent with the consideration of an operator's prudent and efficient costs allowing for the desired quantity and quality of services.

Subsection (c) of the IPART Act requires IPART to have regard to the 'appropriate rate of return on public sector assets' and (g) requires IPART to have regard to 'the impact on pricing policies of borrowing, capital and dividend requirements of the government agency concerned and, in particular, the impact of any need to renew or increase relevant assets'. The ACCC considers that these matters are consistent with consideration of an operator's efficient costs, including a normal market return on investment.

As discussed above, the ACCC considers that the test under subrule 23(a) allows for some flexibility and does not require that the relevant State laws reproduce the WCR requirements exactly and the State regulatory framework could meet the standard required by the WCR in more than one way.

In the ACCC's view, there are no matters to which IPART must have regard that are directly *inconsistent* with 29(2)(b) of the WCR. That is, the ACCC considers that the requirement that IPART have regard to the matters specified above, is consistent with IPART considering WaterNSW's prudent and efficient costs, as well as the factors that will affect those costs.

It is the ACCC's view that NSW State law requires the consideration of matters that are consistent with an effort to replicate a competitive market in which WaterNSW's charges are kept in line with its prudent and efficient costs. The consideration of the factors

³⁵ IPART, [Review of Water NSW's rural bulk water prices from 1 October 2021 to 30 June 2025 Final Report](#), September 2021, p 218. Accessed on 8 February 2022.

³⁶ IPART, [Independent Pricing and Regulatory Tribunal Act 1992](#), section 15(1)(a), accessed 6 April 2022.

specified in section 15 of the IPART Act mean that there is a real chance that WaterNSW's forecast revenue from charges will meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services.

Subrule 29(2)(b) of the WCR also specifies that the forecast revenue should not include:

- (i) *any government contributions related to the provision of those infrastructure services; and*
- (ii) *any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and*
- (iii) *any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.*

There is no explicit obligation on IPART to exclude these amounts. However, as stated above, the ACCC does not consider that the wording of the requirements must exactly match those under subrule 29(2)(b) of the WCR for the ACCC to be satisfied that IPART is required to determine or approve the relevant charges.

While section 15 of the IPART Act does not explicitly require IPART to exclude these amounts from the forecast revenue from charges, the ACCC considers that IPART is able to exclude these amounts under the IPART Act in a way that is consistent with these requirements, in that it is required to have regard to the 'appropriate rate of return on public sector assets' as well as enabling the IPART to consider 'any other matters [it] considers relevant'.

The Ministerial reference explicitly requires IPART 'to consider the approach to approving infrastructure charges provided for under rule 29(2)(b) of the WCR'. The ACCC considers that while section 15 of the IPART Act allows IPART to consider and exclude the relevant revenues, the Ministerial reference ensures that IPART's approach will specifically consider the obligation under the WCR to exclude these amounts.

Based on the assessment of section 15 of the IPART Act and the Ministerial reference, the ACCC considers that it can be satisfied that there is a real chance IPART will determine or approve WaterNSW's prices in a way that is consistent with the requirements under subrule 29(2)(b) of the WCR, such that the forecast revenue from the charges is reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services.

In its letter (at attachment 3 to WaterNSW's notification at **Attachment A**), IPART endorsed an approach to setting prices consistent with the approach prescribed in the WCR, stating:

'... [IPART's] general approach, demonstrated over many years of pricing determinations, is consistent with the approach set out in rule 29(2)(b) of the amended [Water Charge Rules]. That is, IPART generally sets prices that recover efficient costs.'

6. IPART's methodology demonstrates an approach that is consistent with National Water Initiative commitments

Compliance with the NWI commitments is not part of the test under rule 23, however, the ACCC considers that the Productivity Commission's (PC) independent assessment supports the ACCC's assessment of the consistency of State laws with the WCR requirements in this decision. IPART's approach under State law was assessed by the PC as consistent with NWI commitments in its recent assessment of NWI

implementation progress. Under the NWI, jurisdictions agreed to ‘bring into effect pricing policies for water storage and delivery in rural and urban systems that facilitate efficient water use and trade in water entitlements, including through the use of ... full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities, where feasible and practical...’.³⁷ To conduct its assessment, the PC investigated pricing processes and regulation, pricing outcomes and subsidies, and changes in ownership arrangements.³⁸ The PC concluded that ‘Overall, New South Wales, Victoria and the ACT have met the pricing requirements of the NWI for regulated entities’.³⁹

7. IPART is reviewing its approach to pursue efficiency improvements

Although it is not a law of a state, the ACCC considers that the IPART’s methodology shows how it will apply those State laws. IPART is currently reviewing the way it regulates water businesses, including how it approves or determines prices. While this review is still in progress, the ACCC considers that the areas for improvement and proposed reforms identified by IPART give weight to the ACCC’s view the relevant State laws will be applied in a way that is consistent with the requirements under the WCR.

The draft report for this review is due to be released in April 2022⁴⁰ but the most recent discussion paper articulates information asymmetries between the regulator and regulated entity, and a lack of incentives for businesses to show their true efficient costs and seek further efficiencies.

In the paper, IPART proposes a regulatory framework grounded on:

- customer focus - Regulated businesses must identify and deliver services customers want at a price they can afford, in the short and long term
- cost efficiency - Regulated businesses must propose costs that are efficient, and deliver the services customers want at the lowest sustainable cost.
- credibility - Regulated businesses must provide a credible commitment that their proposals can and will be delivered.

Regarding its expenditure review process, IPART proposes to collect more robust information to allow it to quickly assess the efficiency of cost proposals and focus the scope of cost consultants’ work based on the concerns it identifies in pricing proposals.⁴¹

³⁷ Productivity Commission, [Assessment of National Water Initiative implementation progress \(2017–2020\), National Water Reform 2020, Inquiry Report no. 96](#), 28 May 2021, p 72. Available at: [National Water Reform 2020: Inquiry report](#). Accessed on 5 April 2022.

³⁸ Productivity Commission, [Assessment of National Water Initiative implementation progress \(2017–2020\), National Water Reform 2020, Inquiry Report no. 96](#), 28 May 2021, p 75, accessed on 5 April 2022.

³⁹ Productivity Commission, [Assessment of National Water Initiative implementation progress \(2017–2020\), National Water Reform 2020, Inquiry Report no. 96](#), 28 May 2021, p 85, accessed on 5 April 2022.

⁴⁰ IPART has indicated that the draft report will be published in April 2022. The final report is due in August 2022. See: <https://www.ipart.nsw.gov.au/Home/Industries/Water/Reviews/Metro-Pricing/How-we-regulate-the-water-businesses>. Accessed on 28 March 2022.

⁴¹ IPART, [Encouraging innovation in the water sector – Discussion paper](#), August 2021, page 24. Available at: <https://www.ipart.nsw.gov.au/documents/discussion-paper/discussion-paper-encouraging-innovation-water-sector-august-2021>. Accessed on 17 February 2022.

The ACCC has considered the relevant State laws to determine whether WaterNSW's infrastructure charges are approved or determined in way that meets the test under both parts of rule 23(a). The ACCC is satisfied that all of WaterNSW's infrastructure charges will be required to be approved by a single State Agency under a law of a State, and that those infrastructure charges are determined or approved in a way that is consistent with the requirements under subrule 29(2)(b) of the WCR. Further, the ACCC considers that where there is any lack of certainty, the ministerial direction ensures that the framework will be applied with direct reference to the requirements set out subrule 29(2)(b).

8. Conclusion

The ACCC has formed the view that WaterNSW will cease to be a Part 6 operator under rule 23 of the Water Charge Rules 2010 (WCR) after 30 June 2025. This is because the ACCC considers that WaterNSW will be required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with subrule 29(2)(b) of the WCR after the end of WaterNSW's current regulatory period.

This means that after 30 June 2025, IPART will set WaterNSW's infrastructure charges under NSW State law and regulatory framework and will not need an exemption under the WCR to do so.

Attachment 1 – Notification to ACCC

██████████
Director, Water Section
Special Enforcement and Advocacy Division
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000
██████████

9 August 2021
Email

Dear ██████████

WaterNSW: Section 81(11) of the Water Charge Rules 2010

1 Introduction

We refer to:

- the *Water Charge Rules 2010* (Cth) (**Water Charge Rules**) as amended by the *Water Charge Amendment Rules 2019* (Cth) (**Water Charge Amendment Rules**);
- the letters sent to you by Liz Livingstone of the Independent Pricing and Regulatory Tribunal (**IPART**) on 29 January 2020 (Attachment 2) and 10 June 2020 (Attachment 3); and
- the standing reference given to IPART under section 12(1) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**) by the Minister for Customer Service for the pricing of the infrastructure services provided by WaterNSW in the Border, Gwydir, Namoi, Peel, Lachlan, Macquarie, Murray, Murrumbidgee and Lowbidgee valleys in the Murray Darling Basin, and certain rural customers in the Fish River Water Supply Scheme (collectively, **MDB Services**) dated 29 May 2020 (**Standing Reference**) (Attachment 3a).

Rule 81(11) of the Water Charge Rules requires WaterNSW to notify the Australian Competition and Consumer Commission (**ACCC**) of whether or not it is a 'Part 6 operator' under rule 23 of the Water Charge Rules as soon as practicable after 1 July 2020. Rule 81(11) also requires WaterNSW to notify the ACCC of any matter that WaterNSW is aware that may result in it ceasing to be a Part 6 operator, or becoming one, on a specified date as soon as practicable after 1 July 2020.

This letter notifies the ACCC that WaterNSW has ceased to be a 'Part 6 operator' for the MDB Services under the Water Charge Rules as required by rule 81(11) of the Water Charge Rules. Accordingly, WaterNSW considers that the ACCC should form the view that WaterNSW has ceased to be a 'Part 6 operator' in respect of the MDB Services and that the economic regulation of them should transfer to IPART under the IPART Act.

On 29 May 2020, the Minister for Customer Service made the Standing Reference under section 12(1) of the IPART Act that requires IPART to investigate and report the determination of pricing for the MDB Services. The Standing Reference further requires IPART to consider '*the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [Water Charge Rules]*'.

WaterNSW considers that the Standing Reference is a matter that we have become aware of that should lead to the ACCC concluding that we have ceased to be a Part 6 operator.

WaterNSW notes that it provides infrastructure services other than the MDB Services. These infrastructure services are regulated by IPART under the IPART Act. WaterNSW is not a 'Part 6 operator' in respect of these services and the Water Charge Rules do not apply. This letter does not relate to these other infrastructure services provided by WaterNSW.

2 Background

Regulation under the Water Charge Rules

WaterNSW was previously a 'Part 6 operator' in respect of the MDB Services and its provision of these services was regulated by IPART under the Water Charge Rules.

Transition under the amended Water Charge Rules

WaterNSW submitted a pricing proposal for the MDB Services to IPART on 30 June 2020 pursuant to rule 25 of the *Water Charge (Infrastructure) Rules 2010* (Cth) (as they then applied). This pricing proposal is a 'transitional application' as defined in rule 81(2) of the now amended Water Charge Rules. The 'transition period' as defined in rule 81(3) of the Water Charge Rules for WaterNSW will end at the end of the regulatory period of IPART's determination or approval for the transitional application, which is expected to be 30 June 2025.

Under rules 81(6) and 81(7), IPART continues to be the regulator of the MDB Services for the transition period under the Water Charge Rules. IPART is required to make a determination or approval in respect of the transitional application under the Water Charge Rules as they applied prior to their amendment on 1 July 2020.

On 26 May 2021, IPART advised WaterNSW that the Tribunal has decided to defer making its determination of maximum prices WaterNSW can charge for its rural bulk water services and that the Tribunal will now make its determination in mid-September 2021.

Rule 81(4) provides that WaterNSW will continue to be a 'Part 6 operator' under the Water Charge Rules for the transition period even though it has ceased to satisfy rule 23 of the Water Charge Rules.

Requirement to notify the ACCC

Rule 81(11) of the Water Charge Rules requires WaterNSW to notify the ACCC as soon as practicable after 1 July 2020 of:

- whether or not it is a 'Part 6 operator' under rule 23 of the Water Charge Rules as amended; and
- any matter that it is aware of that may result in the infrastructure operator ceasing to be a 'Part 6 operator', or becoming one, on a specified date.

The ACCC must form a view of whether WaterNSW is a 'Part 6 operator' or is likely to cease to be one before the end of the transition period and notify WaterNSW of this view under rule 81(12). If the ACCC is of the view that WaterNSW is, or is likely to be, a 'Part 6 operator', then the ACCC must determine whether to grant an exemption from the operation of Divisions 2, 3 and 4 of Part 6 of the Water Charge Rules after the end of the transition period.

The following sections of this letter notify the ACCC that WaterNSW considers that it has ceased to be a 'Part 6 operator' for the MDB Services and provide the reasons for this notification. It is our view that the ACCC should conclude that WaterNSW is no longer a 'Part 6 operator' and that IPART should regulate WaterNSW's provision of the MDB

Services under the Standing Reference and the IPART Act after the expiry of the transitional period, which is expected to end on 30 June 2025.

3 Notification that WaterNSW has ceased to be a 'Part 6 operator'

Purpose of the amendments to the Water Charge Rules

The amendments to the Water Charge Rules made by the Water Charge Amendment Rules provide for State-based regulators, such as IPART, to regulate infrastructure providers that would otherwise be 'Part 6 operators' under State-based laws rather than to be accredited to regulate those infrastructure providers under the Water Charge Rules. WaterNSW considers that the Water Charge Rules are now intended to operate as a regulatory 'fall-back' only where relevant State laws do not provide for the regulation of the infrastructure provider.

This policy position is reflected at page 146 of the ACCC's *Review of the Water Charge Rules – Final Advice* published in September 2016 (**Final Advice**), which led to the amendments to the Water Charge Rules):

The ACCC agrees ... that there should be appropriate regulatory oversight of the current Part 6 operators and considers this can be achieved where Basin State regulatory approaches ensure that relevant infrastructure operators' costs are prudent and efficient and infrastructure charges are set at levels that would not allow the operator to earn monopoly returns...

'Part 6 operator' criteria

The Water Charge Rules implement this policy approach through the criteria by which an infrastructure provider is determined to be a 'Part 6 operator'. In particular, in order to be a 'Part 6 operator' WaterNSW must satisfy the following requirements set out in rule 23 of the Water Charge Rules:

An infrastructure operator is a Part 6 operator if:

(a) the operator is not required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with paragraph 29(2)(b); and

(b) the operator levies an infrastructure charge in relation to either:

(i) a bulk water service in respect of water access rights; or

(ii) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State.

In WaterNSW's view, it continues to satisfy rule 23(b), but no longer satisfies the requirement set out in rule 23(a) of the Water Charge Rules (which was inserted by the Water Charge Amendment Rules). This is because WaterNSW considers that all of its infrastructure charges will now be determined by IPART under the IPART Act and because IPART Act regulates infrastructure charges in a way that is consistent with rule 29(2)(b) of the Water Charge Rules.

In particular, the Minister for Customer Service made the Standing Reference under section 12(1) of the IPART Act on 29 May 2020. The Standing Reference (Attachment 3) requires IPART to investigate and report the determination of pricing for the MDB Services (which are defined by reference to those services for which WaterNSW is currently a 'Part 6 operator' under the Water Charge Rules) under the IPART Act. The IPART Act requires IPART to set either maximum prices or a methodology for fixing prices for the MDB Services under the Standing Reference having regard to the matters specified in section 15 of the IPART Act and any matters specified by the Minister in the Standing Reference under section 13(1)(c) of the IPART Act.

Regulation in a way that is consistent with rule 29(2)(b)

In our view, the regulatory regime established by the IPART Act and the Standing Reference requires IPART to determine WaterNSW's infrastructure charges for the MDB Services in a way that is consistent with rule 29(2)(b) of the Water Charge Rules. Rule 29(2)(b) of the Water Charge Rules provides that:

(2) The ACCC must not approve the infrastructure charges set out in an application under this Division unless the ACCC is satisfied:

...

(b) that the forecast revenue from the charges is reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services, less:

(i) any government contributions related to the provision of those infrastructure services; and

(ii) any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and

(iii) any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services;

...

WaterNSW considers that the IPART Act ensures that the principle that infrastructure charges are determined or approved in a way consistent with rule 29(2)(b) of the Water Charge Rules is given due consideration by IPART. In particular, the matters that IPART is required to have regard to under section 15 of the IPART Act include (amongst other things):

- *'the cost of providing the services concerned'* under section 15(1)(a) of the IPART Act;
- *'the appropriate rate of return on public sector assets, including appropriate payment of dividends to the Government for the benefit of the people of New South Wales'* under section 15(1)(c) of the IPART Act; and
- *'the need for greater efficiency in the supply of services so as to reduce costs for the benefit of consumers and taxpayers'* under section 15(1)(e) of the IPART Act.

WaterNSW considers that section 15(2) of the IPART Act further reinforces this requirement by requiring IPART to indicate what regard it has had to the matters specified in section 15 of the IPART Act. The other considerations included in section 15(1) of the IPART Act do not detract from the requirement for IPART to give due consideration to the regulation of WaterNSW in a way that is consistent with rule 29(2)(b) of the Water Charge Rules in WaterNSW's view.¹

¹ The other factors that IPART is required to consider include *'the protection of consumers from abuses of monopoly power in terms of prices, pricing policies and standard of services', 'the effect on general price inflation over the medium term', 'the need to maintain ecologically sustainable development (within the meaning of section 6 of the Protection of the Environment Administration Act 1991) by appropriate pricing policies that take account of all the feasible options available to protect the environment', 'the impact on pricing policies of borrowing, capital and dividend requirements of the government agency concerned and, in particular, the impact of any need to renew or increase relevant assets', 'the impact on pricing policies of any arrangements that the government agency concerned has entered into for the exercise of its functions by some other person or body', 'the need to promote competition in the supply of the services concerned', 'considerations of demand management (including levels of demand) and least cost planning', 'the social impact of the determinations and recommendations', and 'standards of quality, reliability and safety of the services concerned (whether those standards are specified by legislation, agreement or otherwise)'.*

WaterNSW considers that the Standing Reference further ensures that the policy objectives underlying rule 29(2)(b) of the Water Charge Rules are given due consideration by specifically requiring IPART to consider '*the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [Water Charge Rules]*'. Further, IPART stated in its letter to the ACCC dated 29 January 2020 (Attachment 2) that it would demonstrate in its public report how it had considered the matter specified in the Standing Reference.

WaterNSW considers that the regulatory regime established by the IPART Act and the Standing Reference, which will apply to its provision of the MDB Services, will ensure consistency with rule 29(2)(b) of the Water Charge Rules because of the matters that IPART must have regard to when determining the infrastructure charges for the MDB Services under the IPART Act. IPART is also of this view and commented in its letter dated 10 June 2020 (Attachment 3) that:

... our general approach, demonstrated over many years of pricing determinations, is consistent with the approach set out in rule 29(2)(b) of the amended [Water Charge Rules]. That is, IPART generally sets prices that recover efficient costs.

This view is also consistent with the ACCC's consideration in the Final Advice. In particular, the ACCC comments in relation to the requirement for a State-based regulatory regime to be consistent with rule 29(2)(b) of the Water Charge Rules at page of 146 as follows (emphasis added; footnotes omitted):

The ACCC considers this will provide an essential level of protection for customers in aggregate — ensuring that revenue from infrastructure charges meets, but does not materially exceed, the prudent and efficient costs of providing the infrastructure services, taking into account government contributions through Community Service Obligations (CSOs) or forgone returns and any other revenue derived from the operator's water service infrastructure (see section 5.6.3).

The ACCC considers that while the criteria used by the alternative State-based regulators (IPART, ESCV, QCA and Essential Services Commission of SA (ESCOSA)) are not identical to the [Basin Water Charging Objectives and Principles] and current Part 6, they are likely to be consistent with the proposed requirements above.

The ACCC's commentary in the Final Advice demonstrates that the ACCC intended the requirement in rule 23(a) of the Water Charge Rules to be interpreted purposively. That is, the requirement is intended to be for the objectives in the State-based regime to be consistent with the principle in rule 29(2)(b) of the Water Charge Rules rather than identical. WaterNSW considers that the criteria that IPART must use when determining the infrastructure charges for the MDB Services under the IPART Act and Standing Reference satisfies this test. WaterNSW considers that it is no longer a 'Part 6 operator' under the Water Charge Rules as a result.

4 Conclusion

WaterNSW does not consider that it satisfies the criteria to be a 'Part 6 operator' under the Water Charge Rules for the reasons described above. If the ACCC forms a different view, then WaterNSW requests that it identify what amendments to the regulatory regime under the IPART Act would be required in order for it to satisfy rule 29(2)(b) of the Water Charge Rules and that it be provided with an opportunity to make a submission on whether it should be exempted from Divisions 2, 3 and 4 of Part 6 of the Water Charge Rules, which the ACCC would then be required to consider under rule 81(12)(c) of the Water Charge Rules.

WaterNSW would welcome the opportunity to discuss these steps further with the ACCC, and to work with the ACCC to ensure that WaterNSW is appropriately regulated under the IPART Act.



The Honourable Victor Dominello MP
Minister for Customer Service

Dr Paul Paterson
Chair, IPART
PO Box K35
Haymarket Post Shop,
Sydney, NSW 1240

Dear Dr Paterson

Paul

Standing reference for the pricing of Water NSW's Murray-Darling Basin Services

Under section 12(1) of the IPART Act, I hereby refer to IPART, for investigation and report, the determination of the pricing for the Murray-Darling Basin Services.¹ This is a standing reference for IPART to determine the pricing for the Murray-Darling Basin Services from time to time. The reference is to remain in effect until it is withdrawn or replaced.

IPART must consider the approach under rule 29(2)(b) of the *Water Charge (Infrastructure) Rules 2010 (Cth)*

Under section 13(1)(c) of the IPART Act, I require IPART, whenever it conducts an investigation pursuant to this reference, to consider the following matter: the approach to approving infrastructure charges provided for under rule 29(2)(b) of the *Water Charge (Infrastructure) Rules 2010 (Cth)*, as they will be upon the commencement of the *Water Charge Amendment Rules 2019 (Cth)*.

Background

Water NSW provides bulk water services to irrigators and other entitlement holders throughout the part of the Murray-Darling Basin that is within NSW. Those services primarily relate to storing bulk water for, and delivering bulk water to, entitlement holders, using Water NSW's dams, weirs and pipelines. These bulk water services are declared to be government monopoly services within the scope of the *Independent Pricing and Regulatory Tribunal (Water Services) Order 2004*.



Victor Dominello MP
Minister for Customer Service

Date: 29.5.20

¹ Attachment A to this letter explains defined terms used in these terms of reference.

Attachment A

Defined terms used in these terms of reference

Infrastructure Service has the meaning given to that term under the *Water Charge (Infrastructure) Rules 2010* (Cth) as at the date of these terms of reference.

IPART Act means the *Independent Pricing and Regulatory Tribunal Act 1992*.

Murray-Darling Basin Services means all Infrastructure Services supplied by Water NSW as a Part 6 Operator.

Part 6 Operator has the meaning given to that term under the *Water Charge (Infrastructure) Rules 2010* (Cth) as at the date of these terms of reference.

The *Murray-Darling Basin* has the meaning given to that term under section 18A of the *Water Act 2007* (Cth).

Our reference: 18/302-3
Your reference: PRJ1003415

10 June 2020

██████████
Director, Water Section
Special Enforcement and Advocacy Division
ACCC
██████████

Copied to: ██████████, Manager Economic Regulation, Water NSW

BY EMAIL

Dear ██████████

New IPART Ministerial reference for Water NSW's Murray-Darling Basin services

We **enclose** a copy of a Ministerial reference to IPART dated 29 May 2020, in respect of Water NSW's Murray-Darling Basin services. This document may assist the ACCC after the commencement on 1 July 2020 of amendments to the *Water Charge (Infrastructure) Rules 2010* (Cth) (**WCIR**), when the ACCC will be required to decide:

- ▼ whether Water NSW is a "Part 6 Operator" under the amended WCIR, and
- ▼ if it is, whether it should be exempted from the operation of the WCIR.

Requirement to consider the approach under rule 29(2)(b)

Notably, the new Ministerial reference **requires** IPART, whenever it determines maximum prices under the reference, to consider the approach to approving infrastructure charges under rule 29(2)(b) of the amended WCIR. We intend to observe that requirement by:

- ▼ notifying stakeholders, including the general public, of the terms of reference and the requirement to consider the approach under rule 29(2)(b) of the WCIR
- ▼ giving all due consideration to the approach under rule 29(2)(b) of the WCIR in our deliberations regarding maximum prices, and
- ▼ documenting, in a publicly available report, how we considered that matter and how it influenced our decisions.

Further, as noted in our letter of 29 January 2020, our general approach, demonstrated over many years of pricing determinations, is consistent with the approach set out in rule 29(2)(b) of the amended WCIR. That is, IPART generally sets prices that recover efficient costs.

IPART's contact officer for this matter is [REDACTED], Director, contactable on [REDACTED]
[REDACTED]

Yours sincerely

[REDACTED]

Signed by: Liz Livingstone

Liz Livingstone

CEO

Enclosed: Standing reference for the pricing of Water NSW's Murray-Darling Basin Services, NSW Minister for Customer Service, 29 May 2020



Our reference: PRJ1003984

Level 17, 2 Lonsdale Street
Melbourne Vic 3000

Your reference: 18/302-3

Contact officer: [REDACTED]

Contact phone: [REDACTED]

GPO Box 3131
Canberra ACT 2601

tel: (03) 9290 1800

www.accc.gov.au

13 December 2021

[REDACTED]
Director, Pricing and Policy
Independent Pricing and Regulatory Tribunal
Level 15, 2-24 Rawson Place
SYDNEY, NSW, 2001

Dear [REDACTED]

Re: Matters relating to ACCC's consideration of WaterNSW's notification that it has ceased to be a Part 6 operator under the Water Charge Rules 2010.

As you are aware the ACCC is required under Part 6 of the [Water Charge Rules 2010](#) (WCR) to decide whether certain infrastructure operators meet the definition of a 'Part 6 operator' and, if so, whether to grant them an exemption from the operation of the requirements of Part 6 of the WCR.

An infrastructure operator is a Part 6 operator if: (a) the operator is not required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with paragraph 29(2)(b); and (b) the operator levies an infrastructure charge in relation to either: (i) a bulk water service in respect of water access rights; or (ii) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State.

On 21 January 2020, WaterNSW, IPART and ACCC staff met to discuss the price regulation of WaterNSW in relation to the WCR. On 10 June 2020 IPART provided a copy of the ministerial reference it had received dated 29 May 2020, regarding WaterNSW's Murray-Darling Basin services.

On 9 August 2021, WaterNSW formally notified the ACCC of its view that it had ceased to be a Part 6 operator under the WCR. The ACCC is currently in the process of forming a view as to whether WaterNSW has ceased to be a Part 6 operator under the WCR.

As part of forming its view, the ACCC is considering whether WaterNSW is required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with subrule 29(2)(b) of the WCR. Subrule 29(2)(b) of the WCR relates to whether the ACCC is satisfied that the infrastructure charges levied by an infrastructure operator are reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure service.

The ACCC notes that under the *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act), the Tribunal in making determinations and recommendations must have regard to a number of matters including sections 15(1)(f) and (k). Section 15(1)(f) requires IPART to consider 'the need to maintain ecologically sustainable development (within the meaning of section 6 of the [Protection of the Environment Administration Act 1991](#)) by appropriate pricing policies that take account of all the feasible options available to protect the environment'. Section 15(1)(k) requires IPART to have regard to 'the social impact of the determinations and recommendations'. As mentioned in your meeting with ACCC staff on 14 October, the ACCC seeks IPART's views on how sections 15(1)(f) and (k) of the IPART Act will be considered in a way consistent with the requirements under subrule 29(2)(b) of the WCR.

Additionally, we refer to the [IPART 2023 – Strategy on a page](#) that sets out IPART's strategic plan for the near future across the Tribunal's functions, including the 'aspiration [to have a] clear framework in place for considering climate change in IPART's regulatory assessments, decisions and advice'. We also note that IPART has released [a statement and framework for tackling climate change](#). In relation to the determination of water charges under the relevant ministerial direction, the ACCC seeks to better understand how IPART's approach to tackling climate change (as noted in the above documents) will be considered in conjunction with the requirements under subrule 29(2)(b) of the WCR. To this end you may wish to forward us any additional explanatory documents you have. If you would like, I would be pleased to arrange a meeting to discuss the issues raised in this letter.

If you have any questions about the above, please contact [REDACTED] on [REDACTED].

Yours sincerely

[REDACTED]

[REDACTED]
Director (a/g)


Water Regulation and Compliance | Small Business and Agriculture Branch
Consumer and Fair Trading Division
Australian Competition & Consumer Commission



Our reference: 18/302-3
Your reference: PRJ1003984



21 December 2021


Director (acting)
Water Regulation and Compliance
ACCC

via email

Dear 

ACCC queries about IPART's regulatory scheme related to WaterNSW's status under the *Water Charge Rules 2010* (Cth)

Thank you for your letter of 13 December 2021. I have raised it with the Tribunal and they have asked me to:

1. reiterate the key features of IPART's regulatory regime that may assist the ACCC to decide whether WaterNSW is a Part 6 Operator or, if it is not, whether it should be exempted from the *Water Charge Rules 2010* (Cth) (**WCR**); and
2. answer your specific questions about the consistency of rule 29(2)(b) of the WCR with:
 - a. sections 15(1)(f) and (k) of the IPART Act; and
 - b. IPART's strategy regarding tackling climate change.

Reiterating the key features of IPART's regulatory regime relevant to the ACCC's deliberations on WaterNSW's status under the WCR

Minister's requirement that IPART consider the approach under rule 29(2)(b) of the WCR

In May last year, the Minister administering the IPART Act issued a new reference for IPART to determine maximum prices for WaterNSW's Murray-Darling Basin services.

An effect of the new terms of reference is that IPART is now legally required, when determining those prices, to give due regard to the approach to approving infrastructure charges under rule 29(2)(b) of the WCR. We would document our reasoning on this point in our publicly available report, each time we determine prices.

IPART is required to have regard to WaterNSW's costs and publicly explain its reasoning

In addition to the new Ministerial requirement, sections 15(1)(a), 15(1)(e) and 15(2) of the IPART Act require us, when determining WaterNSW's maximum prices, to:

- have regard to WaterNSW's costs;
- have regard to the need for greater efficiency in the supply of WaterNSW's services; and

-
- explain how we have had regard to those matters in our public reports.

IPART's track record of setting cost-reflective prices

Further, as noted in our previous correspondence, our general approach, demonstrated over many years of pricing determinations, is consistent with the approach set out in rule 29(2)(b) of the amended WCIR. That is, IPART generally sets prices that recover efficient costs.

Your specific questions about IPART's regulatory regime

How is IPART's duty to consider the need to maintain ecologically sustainable development and social impacts consistent with rule 29(2)(b) of the WCR?

The goal of setting cost-reflective prices is consistent with taking into account the ecological and social impacts of a regulated business' activities. In fact, we consider that it is necessary to seek a full picture of a regulated business in order to understand its costs and determine its prices. This includes the costs of meeting environmental obligations and maintaining its social licence to operate. Prices which did not allow WaterNSW to do so would not be efficient, because they would force WaterNSW to incur overall greater costs in the long-term.

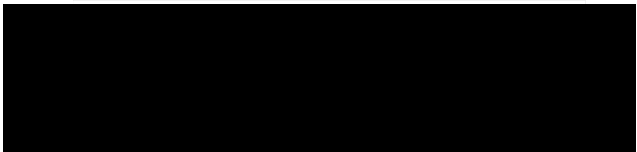
How is IPART's climate change strategy consistent with rule 29(2)(b) of the WCR?

Our statement and framework for tackling climate change commits IPART to considering the best available information about how climate change will affect a regulated business. This reflects the reality that climate change poses significant risks for most of the businesses we regulate. Prudent and efficient businesses prepare and execute strategies for addressing the key risks they face, including those brought about or exacerbated by climate change.

For that reason, IPART's commitment to bear climate change adaptation and mitigation firmly in mind when determining maximum prices under the IPART Act is not at odds with the goal of setting cost-reflective prices embodied in rule 29(2)(b) of the WCR. On the contrary, if we were to ignore those considerations, for example by excluding from prices reasonable expenditure on climate change adaptation, it is likely that the prices we determine would not allow for the recovery of prudent and efficient costs.

IPART's contact officer for this matter is [REDACTED], Director, contactable on [REDACTED]

Yours sincerely



Liz Livingstone
CEO
Signed by: Liz Livingstone